No. 14,109

IN THE

United States Court of Appeals

For the Ninth Circuit

LOUIS E. WOLCHER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

APPELLANT'S CLOSING BRIEF.

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APPELLANT'S CLOSING BRIEF.

Appellee in an attempt to support the judgments herein has made several references to and quoted from the record on the prior appeal (Ap. Br. 6, 8, 9, 17 and 31). These references to and quotations from the prior record, even if competent and material to the appeal now before the Court, do not support appellee's position but, on the contrary, are additional reasons why the judgment herein should be reversed.

However, as appellee has seen fit to refer to the prior record we shall take the same liberty once or twice in the course of this brief.

On pages 7 and 8 of appellee's brief, undoubtedly for the purpose of emphasizing appellee's contention

that Wolcher's testimony was unbelievable and fantastic, appellee states as follows:

> "He also testified that he sent money to Gersh in many different ways: by check, by cash through the mail, by express, by delivering it to Gersh personally, and by 'just stuffed the money in an envelope without registering it.' "

But Gersh at the first trial corroborated Wolcher in the foregoing matters; he testified that he received $85,000 from Wolcher (No. 12, 992, R. 575); that with the exception of two checks all the money was returned to Wolcher in cash (R. 580); that he just put the currency in an envelope and mailed it back to him (R. 603); "Because I remember most of those transactions were in cash. He sent me, always sent me cash, * * *". (R. 607.)

On page 10 appellee argues:

> "To have a story which was at all plausible, Wolcher had to explain the fact that Gersh sent him money in large amounts. The jury had the right to consider the improbability that a man of Wolcher's resources and with thirty years business experience would send a large amount of money across the continent, have it returned to him, and send it back again—*all for the asserted purpose of not making a record*—when he was establishing such a record in the process." (Italics ours.)

The foregoing can only refer to the checks that were sent back and forth between Wolcher and Gersh, the cash sent by Wolcher could not establish any record.

Wolcher explained fully the exchange of checks; he testified that whenever he sent Gersh a check, such check became a record; that to wipe out this record by a cross-item he would subsequently send to Gersh in cash an amount to equal the check and then Gersh would send him back such amount by check and thus the items would cancel each other on his books. (R. 363-4, 380.)

Next, appellee on page 10 states: "Appellant did not call Gersh as a witness". Gersh was a witness adverse to appellant; at the first trial he was called by the Government and, while admitting receipt of $85,000 from Wolcher, denied that such money was sent or delivered to him for the purpose of his procuring whiskey for Wolcher (see opinion of this Court on the prior appeal). Appellant was fully justified in believing the Government would again call Gersh as a rebuttal witness and it was not until the Government rested that appellant knew Gersh was not to testify.

THE COURT ERRED IN INSTRUCTING THE JURY THAT APPELLANT'S GUILT OR INNOCENCE DEPENDED ON THE TRUTH OR FALSITY OF HIS TESTIMONY.

Before answering appellee's argument, that the Court did not err in instructing the jury that if the jurors believed appellant's story they should acquit but if they were convinced beyond a reasonable doubt that his story should not be believed they would be justified in convicting appellant (R. 483; Appellant's

Op. Br. p. 14), we desire to cite a few pertinent authorities in addition to the decision of this Court in *Olender v. United States*, 210 F. 2d 795.

In *Ward v. United States*, (5 Cir.) 96 F. 2d 189, defendant was charged with the illegal possession and transportation of whiskey. The Court held the charge to the jury to be erroneous, stating (p. 192):

> "We think, too, that the point against the charge is well taken. As given, it had the effect of requiring defendant to convince the jury that he was not, instead of requiring the United States to convince them that he was, guilty under the statute. It was no sufficient compliance with appellant's request for a correcting charge, that 'if the jury had a reasonable doubt from the evidence as to whether or not the defendant possessed intoxicating liquor for the purpose of sale, they should acquit him,' for the court to state, as it did, 'I have already charged upon reasonable doubt in general terms.' The court should have modified its charge as given to advise the jury that while proof of the possession of whiskey, in tax-unpaid containers, standing alone made out a prima facie case, yet if upon all the evidence the jury had a reasonable doubt as to whether the possession was for a prohibited or a nonprohibited purpose, they should acquit him."

In *Balman v. United States*, (8 Cir.) 94 F. 2d 197, defendant was convicted of possessing furs stolen from an interstate commerce shipment. The Appellate Court states the portion of the complained of instruction as follows:

"The second and final assignment of error to the court's charge is of greater seriousness. The portion challenged is the following: 'Knowledge of the defendant that the pelts were stolen may be proved by circumstantial evidence; that is, by the facts and circumstances surrounding the transaction involving the pelts from which inference of guilty knowledge necessarily would follow. Proof that the defendant was in possession of property recently stolen raises a presumption of guilty knowledge in the absence of an explanation, and *it is for you to determine whether the defendant's explanation given by him in this case is sufficient to overcome the presumption; that is, it is for you to determine whether you believe the defendant's explanation of the trunk containing the furs being in his residence.*'" (Italics ours.)

The Court of Appeals gives a lengthy dissertation on the vice of such instruction holding (p. 199) that the effect of such instruction was "to impose the burden upon defendant to prove his innocence".

In *Boatright v. United States,* (8 Cir.) 105 F. 2d 737, where defendants were charged with a scheme to defraud, the Court instructed the jury as follows:

"The court also charged the jury as follows: 'On the other hand, if you should find and believe from the evidence in this case that these defendants did not devise an artifice or scheme to defraud; that they did not make false and fraudulent representations or pretenses; that if such were made there was no intention on their part to defraud, and no intention on their part

to obtain money or property by means of the representations made, then it would be your duty to find either one or both of them not guilty, according to what you believe, or either one of them, according to what you believe, if they were without fraudulent intent.' "

In holding the foregoing instruction to be erroneous, the Court of Appeals held as follows:

"The defendants complain that this shifted to them the burden of proving their innocence. It was, of course, incumbent upon the Government to prove every essential element of the offense charged. Unless the Government thus established the guilt of the defendants beyond a reasonable doubt, they were entitled to an acquittal. *But this instruction placed upon the defendants the burden of convincing the jury that they did not devise a scheme, that they did not make false representations, that they did not intend to defraud, that they did not intend to obtain money by false pretenses.* The instruction, we think, was erroneous." (Italics ours.)

In *Lambert v. United States,* (5 Cir.) 101 F. 2d 960, defendant was charged with selling and conspiring to sell narcotics. Contained in footnote 2 on p. 964 is an instruction given to the jury which concluded as follows:

"On the other hand, if you feel, after weighing all of the evidence that has been presented by both sides, that that of the defense outweighs or is equally balanced with that offered by the Government, after applying the law as given to

you by the Court, then you should acquit, but if it fails to balance or equal that offered by the Government and there is not that reasonable doubt about which I have spoken, then it is your duty to find the defendant guilty as charged."

Though no assignment of error was taken to this charge, the Appellate Court considered the question and held as follows (p. 964):

> "In the event of another trial, though no point was made upon it, we think we should call attention to a palpable error in the charge, upon the question of reasonable doubt. It is erroneous because it in effect requires the defendant to acquit himself, rather than requiring the Government to convict him. Subject to only one interpretation, it could have had only one effect upon the jury to have them believe that it was the defendant's duty, by his evidence, to raise a reasonable doubt as to his guilt, and that unless his evidence did so, he should be convicted. Instead, in short, of requiring the Government, by its evidence, to establish defendant's guilt, beyond all reasonable doubt, thus putting the burden on it to convict defendant, the charge required the defendant, by his evidence, to raise a reasonable doubt in his favor, and thus put upon him the burden of acquitting himself as innocent."

Appellee seeks to uphold the giving of the instruction on several grounds which we now discuss.

First, appellee argues that the Court repeatedly instructed the jury that it was the jurors' duty to pass on the facts and that the judge amply advised the

jury as to the burden of proof, presumption of innocence and elements of the offense.

In each of the cases cited above, as did the Court in the *Olender* case, *supra,* the trial judge instructed the jury as to the burden of proof, presumption of innocence, reasonable doubt and the elements of the offense, yet in each case it was held the giving of an instruction was error which in effect, if not in substance as did the instruction herein, told the jury that the burden was on the defendant to establish his innocence or that the guilt or innocence of defendant depended on the truth or falsity of his testimony.

Next, appellee argues that the Court had a right to comment on the evidence. We have no quarrel with this rule but the right to comment on the evidence does not vest the Court with the power or right to tell the jury that their finding as to the truth or falsity of defendant's testimony is sufficient to justify them in returning a verdict of guilty or not guilty as the case may be. If a judge's comment on the evidence is unfair, biased, prejudiced against the defendant or omits material parts of the testimony favorable to the defendant or authorizes the jury to ignore competent evidence in the case and to decide the case on a fractional part of the evidence, then error results despite the fact that the Court has the right to comment on the evidence. (*Boatright v. United States, supra,* at p. 739.)

Appellee then states "there was ample evidence for the jury to find that the Government's case had

been established beyond a reasonable doubt". The question involved here is not whether there was ample evidence to justify the verdict but whether that verdict was arrived at according to law and under proper judicial guidance. If there was not proper judicial guidance, then the verdicts cannot be supported. (*Bollenbach v. United States,* 326 U.S. 607, 612.) However, the instruction in the present case did not leave to the jury the determination of whether the Government's case had been established beyond a reasonable doubt. The instruction authorized the jury to disregard all the evidence in the case except the testimony of appellant and to decide his guilt or innocence according to whether they believed or disbelieved his testimony.

Appellee then argues that "the only evidence in the record of the alleged bonus payments is the uncorroborated story of the appellant". Under the complained of instruction, it became immaterial whether Wolcher's story was corroborated by other circumstances in the case as the instruction told the jury to determine the ultimate issue upon Wolcher's testimony. In our opening brief (pp. 34-36) we have pointed out ample evidence in the record consisting of facts from which the jury would have been justified in inferring (a) that Wolcher's testimony was corroborated and (b) that the Government's case had not been established beyond a reasonable doubt.

The Court's instruction undoubtedly swayed and controlled the deliberations of the jury. As stated

by the California Supreme Court in *People v. Choynski*, 95 Cal. 640, 643, 30 Pac. 796:

> " 'The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court; a word, a look, or a tone may sometimes in such cases be of great or even of controlling influence. A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts.' "

Here, the instruction was the guiding star by which the jury shaped its course and this is made manifest by the verdict. The jury only considered Wolcher's testimony in determining his guilt and did not consider all the other evidence in the case; this is demonstrated by the fact that the jury appended the following to its verdict: "THE JURY RECOMMENDS LENIENCY." (R. 6.) The jury would hardly have made such recommendation unless they believed that outside of Wolcher's testimony there was evidence that created a grave doubt as to his guilt, but that under the Court's instruction they could only consider Wolcher's testimony.

THE COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 21.

This instruction in substance would have told the jury that in computing the cost of the whiskey to Wolcher, the jury should include in that cost any bonus or commission paid by Wolcher for procuring the whiskey.

Appellee attempts to justify the refusal to give this instruction on the ground that the Court fully instructed the jury as to what constituted net income. Appellee on pp. 19 and 20 of its brief sets forth the instructions it claims covered this situation. Nowhere in the Court's instruction is there any mention or reference made to any bonus or commission paid for the procurement of the whiskey. In defining net income the Court stated that it means "the total income that a man has, less the deductions or expenses or expenditures that the law says he can take from it". (R. 481.) Then the Court on p. 483 told the jury that the defendant admitted the black market transactions "but contends that he made no profit in connection with these transactions and that therefore he had no net income * * * because he had to pay out certain moneys in connection with the transactions".

As we argued in our opening brief (pp. 38-39), Mr. Haywood, the Internal Revenue Agent, testified that in computing the profit made by Wolcher on the whiskey transactions, that he "made no allowance for any deductions except the ceiling price of the whiskey". Under this state of the record, the Court's instructions should have been specific that any bonus

or commission or fee paid to procure the whiskey, over and above the ceiling cost thereof, had to be considered as part of the cost. With the testimony of Haywood in mind and under the instructions as given by the Court, the jury undoubtedly concluded that any payment of bonus or commission was illegal and could not be charged as part of the legal cost of the whiskey. Though we have made no point of it on this appeal, we submit the Court's instructions as to net income and taxable income were most confusing. They will be found in the appendix to appellee's brief at pp. viii to ix.

THE COURT ERRED IN NOT GRANTING APPELLANT'S MOTION TO REOPEN THE CASE.

Appellee advances several sophistical arguments to support the Court's action in refusing to reopen the case, so appellant could subpoena and produce Gersh as a witness solely for the purpose of having him identify the bank records of his account with the Corn Exchange Bank.

First, appellee states that the reopening of a case lies within the discretion of the trial Court. This proposition we have admitted in our opening brief; but whenever a matter lies within the discretion of a trial Court *there can be an abuse of that discretion.* Where the Court abuses its discretion to the prejudice of a litigant, such abuse of discretion is subject to review and warrants a reversal of the judgment.

(*Langnes v. Green,* 282 U.S. 531, 541, 75 L. ed. 520, 526.)

A criminal trial involves the liberty and property of a defendant and many times his very life. Such trial is not a game depending on various moves by Court and counsel. A criminal trial is the means sanctioned by law for the ascertainment of an accused's guilt or innocence, and in such trial the accused must be afforded every legitimate and legal means for proving his innocence.

> "It is certainly the policy of the law that one accused of crime shall have every opportunity to prove his innocence; * * * its policy demands that the accused shall have the fairest and fullest opportunity to make clear his innocence."
>
> *Atwell v. United States,* (4 Cir.) 162 Fed. 97; *Sunderland v. United States,* 19 F. 2d 202, 216.

The proof of Wolcher's innocence involved proof of his payment of the money to Gersh. To present a full defense it was necessary to establish the receipt by Gersh of this money. Wolcher had the right to rely upon and believe that the prosecution would call Gersh as a rebuttal witness as it had done at the first trial of the action.

In our opening brief we adopted as our argument the decision of the California Court in the case of *Hayes v. Viscome,* 122 A.C.A. 167, 264 P. 2d 173. Appellee seeks to make short shrift of this decision by stating on p. 30 of its brief as follows:

> "It is sufficient to point out that the circumstances of that case were substantially different from those in the present case. There, as the court stated, the party 'could not have known this (that a certain witness had to be called) unless they had known that defendants did not intend to call him and to assume this would be to assume that defense counsel knew that the doctor's testimony would be adverse.' "

The foregoing language of the California decision, so quoted by appellee, is preceded by the following statement of the Appellate Court:

> "The Court stated to counsel that they should have known much earlier that they would have to call Dr. Berryman".

This is exactly what the trial judge here told appellant. The California Court held that for the plaintiff to have known that they would have had to call Dr. Berryman rested upon two assumptions; first, that plaintiff knew that defendants did not intend to call the doctor and second, that to impute such knowledge to plaintiff would be to assume that the defense counsel knew the doctor's testimony would be adverse.

In the instant case Wolcher did not know that the Government did not intend to call Gersh as a witness and had no reason to assume that Government's counsel knew that Gersh's testimony would be adverse to the Government. Gersh's testimony as given at the first trial contradicted Wolcher's testimony as to the purpose for which the money was sent by Wolcher

to Gersh. Therefore Gersh's testimony would not have been adverse to the Government. At the first trial Gersh was the main witness for the Government on the question of the payment of the money. His testimony covered 82 pages from pp. 557 to 639.

Wolcher's endeavor to call Gersh was not for the purpose of examining him in detail as to his dealings with Wolcher but was solely for the purpose of establishing what had been a Government's Exhibit at the prior trial, to-wit, the record of the Corn Exchange Bank as to Gersh's bank account. Wolcher and his counsel never for a moment were led to believe that this bank account could not be established and it is quite significant that the agent in charge of the entire investigation, resulting in the indictment, testified he had no knowledge of this bank record although it had been produced by the Government at the first trial.

Appellee states it is interesting to note that out of the hundreds of cases involving the propriety of permitting or refusing to permit the reopening of a case, that no case has been found in which the action of the trial judge has been found to be grounds for reversal. (p. 28) It is likewise of interest to note that practically all of the reported cases involved the exercise of the Court's discretion *in permitting the case to be reopened for further evidence. Few judges have ever refused to allow a case to be reopened for further evidence where the proffered testimony was*

material to the sustaining or refuting of an ultimate issue in the case.

Appellee on p. 31 states that appellant's counsel had a superior knowledge of the facts to that of the prosecuting attorney. This statement is incorrect. The prosecuting attorney had the record of the prior trial and the entire file of the Government's agents who had investigated the case.

On Monday, August 31st, at ten o'clock in the morning, Wolcher attempted to establish Gersh's ledger account with the Corn Exchange Bank. In this he was unsuccessful. When he returned to Court at one o'clock that afternoon he advised the Court he had just learned that Gersh was in San Francisco and asked for a reasonable continuance in order to subpoena Gersh so that he could identify the bank account. The Government admitted that Gersh had been under subpoena and had arrived in San Francisco the previous night. Without laboring this point any further, we submit that fairness and justice demanded that Wolcher be given a reasonable opportunity to produce Gersh and thus establish the identity and validity of a document that was so vital to his defense. The action of the Court in denying this reasonable and fair request constituted an abuse of discretion that deprived Wolcher of a fair trial.

THE COURT ERRED IN NOT ALLOWING APPELLANT TO TESTIFY AS TO HIS CONVERSATION WITH GERSH.

Appellee states that a short answer to our argument on the above subject is that the substance of the conversation with Gersh is in the record at p. 382 and then quotes therefrom. It will be noted that these four questions and answers do not narrate the conversation at all. They merely give a short substance thereof which amounts to no more than the opinion and conclusion of the witness. The materiality of the entire conversation has been pointed out in our opening brief from pp. 56-60.

Appellee claims that the called for conversation was hearsay. We cited the case of *Sparks v. United States,* (6 Cir.) 241 F. 777, 791, as authority for the proposition that the called for conversation was not hearsay and that the jury were entitled to know all of the facts and circumstances surrounding the dealings between Wolcher and Gersh, including the conversation that led up to the payment of any money by Wolcher to Gersh.

Appellee attempts to distinguish the *Sparks* case on the ground that the issue there was the intent with which Sparks had done certain acts. Defendants in the *Sparks* case were charged with using the mails in furtherance of a scheme to defraud depositors of a bank. This involved fraudulent intent. Here Wolcher is charged with evading income taxes. This also involves fraudulent intent.

Appellee then states "the question here was not what may have motivated Wolcher's payments to

Gersh, but whether or not any such payments were made''. (Appellee's Brief, p. 26.) Then appellee argues that the conversation might be admitted to show motivation but it was hearsay on the question of whether or not money was actually paid to Gersh. Such argument destroys itself. As the question was whether or not any payments were made to Gersh, it became most material to establish an understanding or agreement between Wolcher and Gersh as to the payment of such money. We know of no other way this could have been done except by narrating the conversation. Appellee states this would have been hearsay testimony and such was the attitude of the trial judge, but the mere fact that the testimony is hearsay does not render it inadmissible. Hearsay is admissible and competent evidence if it forms part of the *res gestae.* The question of what constitutes the *res gestae* has been many times before the Court and under the rulings announced the conversation in its entirety was admissible.

In *Yarbrough v. Prudential Insurance Company,* (5 Cir.) 99 F. 2d 874, the Court lays down the rule as to what constitutes *res gestae* so far as the admission of conversations is concerned. The trial involved an insurance policy and whether it was delivered by the company to the insured. The insured died a day or two following the issuance of the policy. The widow of the insured and two others attempted to testify as to what the insured had said when he brought the policy home. The Court of Appeals held as follows:

"Are the statements of these three witnesses relevant evidence to come in along with the main facts as parts of the res gestae?

Res gestae must spring from the main fact; it presupposes a main fact and it means the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. 'One peculiarity of the main fact or transaction ought to be noted, and that is that it is not necessarily limited as to time—it may be a length of time in the action. The time of course depends upon the character of the transaction * * *'. *Mitchum v. State of Georgia,* 11 Ga. 615.

Here the main fact was the delivery of the policy in question. It came into possession of the insured on June 2, and he was drowned on June 4, 1937. The appellee had been permitted to testify that such delivery was for inspection only, and each of his employees testified that no payment for same was made to them. Of course declarations made, to be relevant as evidence, must have been voluntary and spontaneous and free from deliberate or studied design. *Mitchum v. State of Georgia, supra*; *Gibson Oil Co. et al. v. Westbrooke,* 160 Okl. 26, 16 P.2d 127; *McMahon v. Ed. G. Budd Mfg. Co. et al.,* 108 Pa. Super. 235, 164 A. 850.

The modern tendency is to extend, rather than to narrow, the rule as to the admission of declarations as part of the res gestae, especially in view of the fact that the parties now are generally permitted to testify in their own behalf and to consider the grounds which formerly excluded

such declarations as affecting their weight only. 'Its development has been promoted in modern times, by an effort to afford the triers of fact all reasonable means of ascertaining the truth, instead of withholding from them all information possible by the rigid application of certain rules of exclusion. The question is not how little, but how much, logically competent proof is admissible.' 10 R.C.L. 975, Sec. 158."

In *Barshop v. United States,* (5 Cir.) 191 Fed. 2d 286, 292, the Court states:

"The letter could be admissible only upon the theory that it is a part of the res gestae of the remittance. 'Res gestae must spring from the main fact; it presupposes a main fact and it means the circumstances, facts and declarations which grow out of the main fact, are contemporaneous with it, and serve to illustrate its character. * * *' *Yarbrough v. Prudential Ins. Co. of America,* 5 Cir., 99 F.2d 874, 876.

The main fact 'may, however, be either the ultimate fact to be proved or some fact evidentiary of that fact.' 32 C.J.S., Evidence, Sec. 405."

We submit that the dealings between Wolcher and Gersh fall within the rules of the foregoing cases. Besides, as stated in the cases of *Haigler v. United States*, 172 F. 2d 986 and *Cooper v. United States,* 9 F. 2d 216, quoted from on p. 60 of our opening brief, the defendant was entitled to show anything that had a tendency to demonstrate his honesty in dealing with the Government, including conversations had

with third persons that tended to support his testimony.

Dated, San Francisco, California,
June 11, 1954.

Respectfully submitted,
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